APPENDIX A

NEW YORK STATE COURT OF APPEALS

Docket No.:

IN THE MATTER OF:

SARATOGA CHAMBER OF COMMMERCE, *et al.*
Appellant,

VS.

GEORGE PATAKI,
Respondent.

May 6, 2003

HELD AT: New York State Court of Appeals
New York, NY 10000

BEFORE:

APPEARANCES: ANDREW D. BING
Attorney for Appellants

CORNELIUS D. MURRAY
Attorney for the Respondent,
Saratoga County Chamber
of Commerce

JAY GOLDBERG
Attorney for the Respondent,
Wright, *et al.*

THE BAILIFF: The Judges of the Court. Hear ye! Hear ye! Hear ye! All persons having any business before this Court of Appeals held in and for the State of New York, may now draw near, give their attendance, and they will be heard.

[BREAK IN TAPE]

MR. NESSEX [PH]: Over and over again, this Court and the appellant divisions send these things back for [inaudible]—over and over again to say, "Do it again, you didn't do it right. It wasn't open enough—it wasn't detailed enough—it wasn't complete." But here, the [inaudible] didn't complain, and I think that's his principal problem.

FEMALE JUSTICE ONE: Thank you, Mr. Nessex [phonetic]. You didn't—

MALE VOICE: Did I not ask? I'm sorry.

FEMALE JUSTICE ONE: Saratoga County Chamber of Commerce v. Pataki. Mr. Bing, welcome back.

MR. BING: Thank you, Your Honor. Good afternoon, Your Honors, and may it please the Court. May I reserve five minutes for rebuttal?

FEMALE JUSTICE ONE: Yes.

MR. BING: There are three general topics regarding mootness that I would like to address this afternoon. The first deals with the 1999 Amendment, the second deals with the 1993 Compact, and the third deals with the concept of prospective injunctive relief, which was discussed in the submissions by plaintiff's counsel.

First, with respect to the 1999 Amendment—I put that first because I think that's probably the easiest case—that Amendment expired in the year 2000, and we are of the view that the portion of this action that challenges the validity of that Amendment is moot and the mootness exception does not apply to it. Even granting the importance of the issues at

stake, with respect to the Amendment, there is no assurance that the question of lack of legislative authority for the Governor's execution of a renewal Amendment will recur. The legislature has already authorized up to six [inaudible] Compacts and in laws 2001, Chapter 383, and there is no reason to believe that they would not necessarily—that they would not authorize a renewal Amendment. Moreover, this Court cannot assume that any renewal Amendment would evade review. Although the 1999 Amendment had a one-year term, the 2000 amendments that were rejected by the Interior Departments both had five-year terms. I believe there's a statement to the effect that they were one-year terms and—

MALE JUSTICE ONE: So what are you asking us to do about the 1993 Compact?

FEMALE JUSTICE ONE: What's moot about that?

MR. BING: I think the short answer, Your Honor, is that based on the submissions and based on Mr. Goldberg's statements, particularly at the argument in March, I think there still is a live controversy with respect to the validity of the 1993 Compact. We raised the question of mootness regarding at point four in our reply brief because there appeared to be some equivocal statements in the respondent's briefs in this Court, suggesting that perhaps the plaintiffs were willing to forego any relief with respect to the 1993 Compact, and we were afraid that—because we were convinced that the '99 amendment part was moot, and we thought that if the Court found this part also moot—the '93 Compact—the Court might moot the entire case. And in the event that happened, we thought the appropriate remedy was to reverse the orders appealed from and remit the matter to the appellate division for dismissal of the complaints on the grounds of mootness, and we believed this was inappropriate—this position—in the event the Court found the entire case moot.

FEMALE JUSTICE ONE: But you acknowledge at this point that the challenge to the 1993 Compact, Mr. Bing, doesn't raise an issue of mootness.

MR. BING: I believe that to be the case based on the statements and the submissions—particularly the submission of the Wright plaintiffs—and also based on Mr. Goldberg's statements here in March, where he seemed to continue to contest the validity of the 1993 Compact.

FEMALE JUSTICE ONE: So it's still a live controversy and you're not imposing any defenses of laches or statute of limitations or anything like that?

MR. BING: Oh, with respect to the 1993 Compact, we believe that this Court should reverse based on every argument set forth in our brief and our reply brief. We still believe that the Tribe was an indispensable party, this action never should have gone forward in the Tribe's absence, that the judgment below overwhelmingly prejudices the tribe, and that's the additional arguments made in the submissions and also in the briefs of the plaintiffs. That even with legislative authorization the Tribe would not be able to conduct Class Three gaming on its reservation pursuant to federal law also directly prejudices the Tribe's interests because it is completely—it's a direct affront to their power under federal law. Certainly, we think that that argument is still—obviously still helpful.

MALE JUSTICE ONE: We understand—

FEMALE JUSTICE ONE: I appreciate your statements, Mr. Bing, particularly in light of the sentence we quoted—or extracted—from your reply brief that led us to believe—or some of us—that you were claiming mootness as to the earlier one. I understand that had to do with the statements of your adversaries about no practical impact. Is that—is that how that all arose?

MR. BING: It arose—yes, it—

FEMALE JUSTICE ONE: So what do you say would be the practical impact?

MR. BING: With respect to the 1993 compact—

FEMALE JUSTICE ONE: Yes, yes.

MR. BING: And the existing judgment?

FEMALE JUSTICE ONE: Yes.

MR. BING: Well, as we set forth at length in both of our briefs, the effect of the judgment which declares that the Compact the Tribe negotiated with the State to be void and unenforceable I think has a number—there are a number of prejudicial impacts on the Tribe. I think first and foremost the Compact is the Tribe's ticket to gamble on its reservation in New York, and with a declaration of the Court—the Compact is void and unenforceable—imperils the Tribe's ability to continue to do that. I think the Ninth Circuit recognized that in the American Greyhound case.

MALE JUSTICE TWO: Does the Compact violate Article 1, Section 9?

MR. BING: Not in our view, Your Honor.

MALE JUSTICE TWO: Why not?

MR. BING: Because the—perhaps I should say that the—the overlay of federal law on existing New York law, which permits gaming—a substantial amount of lawful gaming in New York and IGRA—the Indian Gaming Regulatory Act—which says that the extent that gaming is allowed in the State for any—by any person for any purpose—that it is the subject of IGRA Compact negotiations—

MALE JUSTICE TWO: But you don't want us to reach that question.

MR. BING: I think the primary objection—although that issue has been asserted by the plaintiffs—the rulings of both courts—particularly Judge Teresi [phonetic] in Supreme Court, which was affirmed by the appellant division—although as counsel pointed out, the appellate division did, I think, in Dictiff [phonetic], suggest that they thought that the gaming was not consistent with Article 1, Section 9. But the primary thrust of this case has been the absence of legislative authorization for the—

MALE JUSTICE ONE: But that question goes to Article 1, Section 9. You are asserting that the Compact is constitutional and you want us to make a statement to that affect or just ignore it, period?

MR. BING: Well, I think if the Court finds—if this Court finds that the—agrees with us on any of our procedural challenges to this case, then I think that's the end of it. If you agree with us on indispensable party, or statute of limitation, or laches, or standing, then you don't reach either of the two merits questions.

MALE JUSTICE ONE: Suppose we disagree with you on all of the judicial challenges?

MR. BING: If you disagree with us on every procedural objection, and you agree with us that under separation of powers principle the Governor had the authority to sign a Compact, then I think certainly you could probably find the question as to whether this gaming was prohibited by the Constitution to be before you.

MALE JUSTICE ONE: That's the only question left, but if—conversely, if we disagreed with you on the procedural aspects and we further disagree with you on the checks and balances argument—this is all hypothetical, we're laying out all the options here—that would mean that we would not necessarily reach the constitutional question insofar as the constitutionality of gambling.

MR. BING: I think that's analytically correct as a logical matter; I would like to make clear what our argument—

FEMALE JUSTICE ONE: It's however, Mr. Bing, if the Court were to find that the Compact violates Article 1, Section 9, then legislative authorization wouldn't save the Compact, correct?

MR. BING: I guess that's true, which—

FEMALE JUSTICE ONE: And these may be questions more to ask your adversaries what it is they're looking for in terms of a remedy here, but ratification by the state legislature wouldn't assist the Tribe, correct?

MR. BING: If you find that the gaming—if you reject our argument on the IGRA in essence, it's supreme to the extent that it authorizes on-reservation gaming to the extent that that gaming is allowable in the State for any purpose by any person. If you reject that argument, then I think you're confronted with the question that this appears to be outside any of the Article 1, Section 9 exceptions.

FEMALE JUSTICE ONE: I'm sorry—

MR. BING: I'd like to make clear what our point is with respect to Article 1, Section 9, however—

FEMALE JUSTICE ONE: May I just ask one question sort of related back to what was happening—the ticket to gambling that you spoke about. Is it not true that as it stands now, since the 1999 Amendment has expired by operation of law, that there is illicit gambling going on in the casinos right now?

MR. BING: There is uncompacted—

FEMALE JUSTICE ONE: Uncompacted—

MR. BING: —[inaudible] electronic gaming going on, that is correct.

FEMALE JUSTICE ONE: So technically, they're in violation, right?

MR. BING: Because the gambling Compact—because the Amendments were not renewed there's—that's correct.

MALE JUSTICE ONE: So if we disagree with you on the—

MALE JUSTICE THREE: Federal law prohibits us—the State officials—from enforcing it, it's left to the Secretary to determine whether there's a violation, isn't it—the Secretary of the Interior—for which I would suspect there's a fairly substantial preemption question as to whether the State can stop the gambling on sovereign Indian land—isn't that the case?

MR. BING: Your Honor, I'm not positive what the answer to that question is. I don't think we have the criminal authority to go on the Reservation with respect to uncompacted gambling.

FEMALE JUSTICE ONE: I have a question about the practical effect, too. On the practical effect—let's say we disagree with you on the procedural issues and we disagree with you on the separation of powers—then what happens with respect to the racing wagering employees and the State Police investigations and all of these other regulatory functions that the State employees are performing—what happens with that, does that continue or does that not continue?

MR. BING: If you find that the—

FEMALE JUSTICE ONE: It's unconstitutional on whatever basis, I guess.

MR. BING: If the Compact is voided, the state—the state officials, I think, would be unable to continue to perform their functions. I think in our brief we said that in that event the tribal official—the tribal gaming authority—would take over

whatever functions. To the extent that gaming—plaintiffs have said that they're not seeking to enjoin the existing gambling operation apart from the electronic gaming—I think that what you would have under this scenario would be the unregulated on-reservation class III gaming. I think if you—if anything—and again, that's another harm to the Tribe because they bargained for the presence and for the—and the expertise of the state officials. I think without that they didn't get the benefit of their bargain, and I think that, again, another aspect of the prejudice of allowing this—you know, such a decision would have with respect to the Tribe—

MALE JUSTICE TWO: A question—would we be ignoring the State Constitution if we didn't rule it unconstitutional?

MR. BING: No, I think—I think—Judge Smith, I think, respectfully, it would be acknowledging the supremacy of federal law within the sphere of Indian relations. A situation which, under the Indian Commerce Clause, Congress has plaintive [phonetic] jurisdiction and has exercised it in IGRA to the extent of saying that to the extent that this gaming is allowed under New York State law to any person for any purpose, it must be the subject of an IGRA compact negotiation; and Congress has said, in that context, that where you have a state like New York, which has eight billion dollars a year of legal gambling in various different forms, you can't deny that kind of gambling—

MALE JUSTICE TWO: Including type III gambling.

MR. BING: Including class III casino gambling which is lawful—various types of that are lawful in New York already for specific narrow purposes. But the Mashantucket Pequot case that we cited in our briefs makes clear that merely because that the state limits on that kind of gambling cannot be applied to the Tribe is a take it or leave it proposition.

MALE JUSTICE THREE: Question, if there's to be a—and I'm not suggesting one way or another, but just as far as the options out there—a straight out affirmance would contemplate a rejection of the procedural impediments that have been raised—right? And also, it would connote a disagreement with your position on the separation of powers, would it not?

MR. BING: That's correct.

MALE JUSTICE: —Well—

MALE JUSTICE THREE: Would the—

MALE JUSTICE: Go ahead, I'm sorry.

MALE JUSTICE THREE: Would it then leave open to the legislature the possibility of determining whether they, as legislators, would, as a state, give the Indians the ticket?

MR. BING: No, the legislature already has—

MALE JUSTICE THREE: Not in this—not in the '93.

MR. BING: That's correct, not in this case.

MALE JUSTICE THREE: So would they be able to go back and determine whether the '93 type—the '93 arrangement—or they could renegotiate another one in the name of the legislature, given that an affirmance would apply—imply that they do—that the Governor did not have the power to do. So could they do it anew? Wouldn't that be the appropriate course?

MR. BING: Well, again, I think merely stating that remedy conclusively establishes that the Tribe is an indispensable party whose interests would be substantially prejudiced by any such ruling.

FEMALE JUSTICE ONE: We understand that argument, but still would be interested in your answer to Judge Rosenblatt's question.

MR. BING: If—if there was an affirmance, I think the affect of the affirmance would be, with respect to the '93 Compact, that the declaration that it is voided unenforceable would be affirmed. And if the injunction—the prospective injunction from Judge Teresi—would be affirmed, it would not necessarily require—I don't think—the renegotiation of the Compact. I think what it very well could require is, as I said earlier, it would affect our ability to—conceivably—to have—although I guess I must point out that plaintiffs initially said that they were not trying to pull our people out of the—

MALE JUSTICE THREE: You were about to finish the sentence. I'm waiting for you to finish the sentence.

MR. BING: I think the bottom line is that we would—arguably, there wouldn't be any authority for our people to be there anymore.

MALE JUSTICE THREE: Why wouldn't the legislature be able to do what—

FEMALE JUSTICE ONE: Couldn't the legislature—yeah, couldn't the legislature ratify it?

MR. BING: I think the legislature could ratify it ex post facto.

MALE JUSTICE THREE: Right, or start it all over again.

MR. BING: Al bonicio [phonetic].

MALE JUSTICE THREE: Right.

MR. BING: I think that's true.

MALE JUSTICE THREE: They could.

MR. BING: If—

MALE JUSTICE THREE: One more question on—

FEMALE JUSTICE ONE: Then it will not come as bad news to you, Mr. Bing that your time has expired. But Judge Rosenblatt had one last question.

MALE JUSTICE THREE: Another question, yeah, another question. On the—I didn't mean to imply that we're rejecting or that I am rejecting or anyone else is rejecting the procedural arguments. So I want to ask you about one of the procedural arguments which is—which is laches tied in with an indispensable party and what you characterize as prejudice to the Tribe. We know that the Tribe spent a lot of money—thirty million dollars or some figure in that neighborhood—and that you were arguing on their behalf—although they're not here and apparently they don't want to come in—that this would disserve them because they've expended all of this money. The other side says, "Well, they spent a lot of money, but presumably they're making back a lot of money as well"—under what they characterize as an illegal operation. So do we know, in terms of prejudice and harm, that even though they've put out thirty million, that they have not yet made back thirty million plus—maybe a lot more—do we know anything about that on this record?

MR. BING: I don't think we do, Your Honor, but I think—again, I think it's worth pointing out that the Tribe's—

MALE JUSTICE THREE: It goes to prejudice, does it not, because if they put out thirty and they made sixty that they were not entitled to, that has less appeal in terms of prejudice doesn't it?

MR. BING: Your Honor, the question of whether or not they're entitled to it is a question they're entitled to be heard on, and their absence from this case is not a result of their whim or caprice, it's a result of sovereign immunity—

MALE JUSTICE THREE: I understand—

MR. BING: —which society has recognized irregardless.

MALE JUSTICE THREE: I understand, but we don't know—in terms of the finances, we don't know whether that money was recouped—

MR. BING: No, we don't.

MALE JUSTICE THREE: —whether it's been lost.

FEMALE JUSTICE ONE: So Mr. Bing, that makes it impossible ever to challenge the authority of the Governor to separately enter into such a Compact, does it not?

MR. BING: We're saying, in this case, when the action isn't brought until nearly six years after the Compact is signed and when the Tribe has expended a substantial amount of money to open this casino in compliance with the Compact, that the tribe is an indispensable party and they—

FEMALE JUSTICE ONE: So they would not have been an indispensable party six years ago?

MR. BING: I think that each case requires examination under the factors of Section 1001 b—about the indispensable party. I think each case requires examination on its own facts and on its record.

MALE JUSTICE TWO: Well, why wouldn't they have been an indispensable party back in 1995 [inaudible]?

MALE JUSTICE THREE: But they would have the laches argument, wouldn't they?

MALE JUSTICE TWO: What would be different about your argument?

MR. BING: I think the argument of prejudice perhaps would be less compelling, given the fact that they had not yet opened the casino. But again, I think that this case—whatever the results may be in particular—other particular fact patterns in other particular records—

MALE JUSTICE TWO: Well, are you saying that they would not be indispensable at that time?

MR. BING: No, I'm not, Your Honor, I'm saying that you have to evaluate the facts of that particular case and look at the record in that particular case before making that determination.

MALE JUSTICE TWO: So they could have been indispensable at that time also.

MR. BING: Yes, absolutely.

FEMALE JUSTICE ONE: Thank you, Mr. Bing, you do have your rebuttal time. Mr. Murray.

MR. MURRAY: Yes, thank you, Your Honor. May it please the Court. It's nice to be back, although I must admit I hadn't expected to be back quite so soon. Your Honors, to expand on Mr. Bing's metaphor regarding the issue of the issuance of the ticket by the Governor. Our point in this case is where does the Governor derive the power to issue that ticket, and I respectfully submit—and there's three points I'd like to make in my time allotted, if I could—and that is number one, this action isn't moot, and even if it otherwise were, the three exceptions enunciated in the Hearst case dictate that it is not moot. And finally, even if you decide that Hearst doesn't apply, one of the things that Mr. Bing invited this Court to do is not only to declare it moot, but to take the extraordinary second step of vacating the lower court order. So we're urging—

FEMALE JUSTICE ONE: Mr. Murray, I wonder if you could add a fourth point, and it comes as no surprise I'm sure, when you hear several of us have asked about practical impacts here—were you to prevail, were there to be an affirmance.

MR. MURRAY: If there were an affirmance here, Your Honor, I think it depends on what the Court does. If the

Court says—what I'm asking the Court to do, by the way—to minimize the "harm" to the Tribe, not that we have to—but is not to even get into the problem of the '93 Compact. Simply say this issue is clearly before the Court on [inaudible] declaratory judgment action, because under a declaratory judgment action it's clear from previous decisions of this case—I've cited them in my supplemental letter to the Court—Nightburg v. Harriet Possman [phonetic]—that the classic use of declaratory judgment action is also to correct potential future wrong.

MALE JUSTICE FOUR: Well, that's interesting, because in Nightburg a majority of this Court dismissed the claim where people sought an advisory opinion with regard to the constitutionality of [inaudible] amendment and why would we—if you don't seek any—and this is what I need to know from you—do you seek an injunction precluding the expenditure of state funds with regard to any state involvement with the casino currently run by the St. Regis Reservation, yes or no?

MR. MURRAY: Yes, Your Honor—

MALE JUSTICE FOUR: So isn't that contrary then to the representation you made at the appellate division memorialized in the appellate division's decision?

MR. MURRAY: No, Your Honor, and here's why—what we're asking in our very narrowly tailored relief is to say the Racing and Wagering Board personnel can remain up there, they can appropriate—

MALE JUSTICE FOUR: Even though the Compact's unconstitutional, you would allow the expenditure of funds for an unconstitutional purpose?

MR. MURRAY: Minimize the affect—yes, Judge, insofar as it pertains to the original Compact.

MALE JUSTICE FOUR: Well, in your letter to us, you told us that we shouldn't—you made the analogy to a house of prostitution in the City of Albany—are you content with a little bit of prostitution on the St. Regis Reservation?

MR. MURRAY: Just to get back to my point Judge, here's what I tried to do—I tried to minimize the affect on the Tribe. Your point is well taken—

MALE JUSTICE FOUR: Well, you got a problem because the Tribe is an indispensable party and they're the only one who can assert laches and whether they're—whether they are—once you decide that they're an indispensable party, then it's a balancing of equities as to whether to continue with the lawsuit. But let me ask you one more question and then I'll leave you alone for two minutes—not forever.

MR. MURRAY: Sure.

MALE JUSTICE FOUR: You represent taxpayers and organizations—

MR. MURRAY: Right.

MALE JUSTICE FOUR: —and you're now saying to all of us—all seven of us assembled—that you're willing to allow the illegal expenditure of taxpayer dollars at Akwesasne, is that true?

MR. MURRAY: Insofar as it doesn't expand upon the original Compact [inaudible].

MALE JUSTICE FOUR: Then second of all, you're then willing to consent to have illegal gambling occur at Akwesasne, is that true?

MR. MURRAY: Insofar—that's true, Judge—

MALE JUSTICE FOUR: What is the harm then—the harm that you claim to create standing for taxpayers and those opposed to gambling—is it the illegal expenditure of taxpayer funds and gambling for those who find it morally repugnant

and unconstitutional? What is the standing of your clients when they—they consent to the very harm—I'm sure you have authority to say this—where they consent to the very harm that creates the foundation for their standing to insure us that this is a live case or controversy and not merely an opinion of this Court of what the law is, such that it might affect others not here before the Court?

MR. MURRAY: Fair question, Your Honor. I think it's—it's missing the point—it's the tail wagging the dog—to focus just on what's already happened. What we're trying to do is to prevent this from going any further. We don't want Racing and Wagering personnel up there monitoring an electronic gaming device that's illegal. What we've said is, "What's happened has happened." Okay, going into the future we'll concede that's a little inconsistent with our position, but our position is we're trying to tailor a relief here—a fashioned relief—that minimizes the impact on the Tribe, deals with the indispensability issue—although I don't think the Tribe is an indispensable party. But my point is, Judge, okay, what they've done is wrong; if you want to go for the equities of the Tribe and the Court is concerned about being unfair to a party that is not before the Court—okay, they've done that, but are we going to send additional Racing and Wagering personnel up there to monitor what's going to happen if they now engage in electronic gaming?

FEMALE JUSTICE ONE: Well, if this Court—if this Court declares the '93 Compact void and unenforceable—

MR. MURRAY: Right.

FEMALE JUSTICE ONE: —does the Tribe even have to allow Racing and Wagering employees on the Reservation or in the casino, and will they continue to turn over employee records to the State Police to conduct background tests? I mean this is, in terms of the practical ramifications—

MR. MURRAY: Sure, sure.

FEMALE JUSTICE ONE: —do they have to uphold their end of the bargain?

MR. MURRAY: They can't game anymore at all in that circumstance. This is the danger if this Court declares the '93 Compact illegal, and why—within the context of the declaratory judgment action—my position is we can forget '93 and go forward. Here's what happens—

FEMALE JUSTICE ONE: But, I thought that was the relief you were requesting, Mr. Murray?

MR. MURRAY: My relief—my relief says leave '93—

FEMALE JUSTICE ONE: You're not asking us to declare—

MR. MURRAY: I'm saying—I've said—I know—

MALE JUSTICE TWO: But you did originally.

MR. MURRAY: —jumping out of his chair at me.

FEMALE JUSTICE ONE: Well, I'm having a bit of a struggle myself listening to what you just said.

MR. MURRAY: Sure, here's the issue, Your Honor, if the—and also to further Judge Wesley's question—relative to—what a declaratory judgment—what's the relief that the party's entitled to in the context of the declaratory judgment action, and it's true, Judge, that in Nightburg they ultimately decided that they weren't going to go there, but they articulated the standard that they're going to address in every case and that is—not to take a long time here—when a party contemplates taking certain action, a genuine dispute may arise before any breach or violation has occurred and before there is any need or right to resort to corrective measures. Here's my point, this is not some wonderful, abstract, law school academic question.

MALE JUSTICE FOUR: Could you read the—Mr. Murray, I, you know, I—that's an interesting sentence, but

how about the sentence before it, "The court should not perform useless or futile acts and thus should not resolve disputed legal questions unless this would have an immediate, practical affect on the conduct of the parties."

MR. MURRAY: Right.

MALE JUSTICE FOUR: But you've eviscerated the request for immediate or practical affect. Let the Aquisassy Casino continue to be open, let state taxpayer dollars continue to fund illegal and unconstitutional activity. I submit to you, sir, that standing—and ask you—is not standing—which insures a live case or controversy—predicated upon injury?

MR. MURRAY: Judge—

MALE JUSTICE FOUR: Yes?

MR. MURRAY: Yes, but it's going to get worse. Here's what I'm saying, you don't have—say, "Look, forget it, Mr. Murray, we're going to go after the '93 Compact—so be it"—what my concern has been, Judge, all along is that we're sort of being penalized here for not going after the death penalty and asking to shut down—

MALE JUSTICE FOUR: I know you're confronted—you're confronted with a sovereign defendant that you can't get into court, and then you've got an indispensable party argument.

MR. MURRAY: And I can appreciate that your attempt—because you're a darn good lawyer—to craft the limitations and what you request, but every once in awhile, after you've pared enough of the onion, there's no onion left. And so one last thing, and I—because you've expressed yourself very clearly on this—and articulate—in essence, what you say is, is that your concern is, "Look, we've got this sovereignty thing here that's not going to—that's going to keep us at bay, and so therefore let the '93 agreement go." Now, you've then decimated what you've asked for, but you say, "Well, it's into

the future and we can't get to it quick enough." And I ask you, have you read Johnson v. Pitaki where District Attorney Johnson sought to prohibit the Governor from appointing a special prosecutor in a death prosecution?

MR. MURRAY: I haven't read that.

MALE JUSTICE FOUR: Attorney Johnson brought an Article 78 proceeding and was able to accomplish judicial determination of the respective rights of the parties within a very short period of time. Would you now have Article 78 relief—I realize that may make this action untimely—but would you not have Article 78 relief where you contend, pursuant to Article 78, Subdivision 3, I think it is—78.01 Subdivision 3—that the act is illegal, and could you not seek injunctive relief prohibiting that illegal act, which would inherently have within it the necessity of declaring and determining the rights of the parties, and would you not then have an accelerated mechanism begun by an order to show cause prohibiting the governor—immediately upon signing an individual Compact with another Tribe—from doing anything further until after courts have looked at it?

MR. MURRAY: Before—before the Governor has acted?

MALE JUSTICE FOUR: The day that he signed—it's served him.

MR. MURRAY: Oh, the day—the day he—well, right then, Judge, here's what I think the dilemma is for the Court—you have to—you have to then deal that indispensability issue right away. Here's what I'm saying to the Court, if you—

MALE JUSTICE FOUR: I agree, and is it not true that the indispensability here becomes a problem for you because of laches. But laches are a function of time and if this—if this problem is identified at the time of signing the document, laches becomes irrelevant.

MR. MURRAY: Indispensability is an issue at all times, Judge. It's an issue—

MALE JUSTICE FOUR: Absolutely, but determining whether to dismiss on indispensability is a function of discretion in weighing at least four or five factors as enumerated in the statute.

MR. MURRAY: Correct—by the way, the mere fact that the party can't be before the Court is not dispositive.

MALE JUSTICE FOUR: And but for—and but for the fact that the nation—there's a substantial—the appellant division agrees so—in fact the appellant division does an interesting analysis—"Geez, laches is a really viable defense, but well, it's only available to the Tribe and they're not here so we don't have to worry about it." But—

MR. MURRAY: If laches is a defense, which it's not, Judge—I respectfully submit—because it's continuing wrong issue. They got it wrong going into the future and I gave a couple of dramatic hypotheticals—

MALE JUSTICE THREE: They were good hypotheticals. I don't have one to refute them; otherwise I would have given you one.

FEMALE JUSTICE ONE: Mr. Murray, I'm getting lost here, quite frankly, have—are you backing away from your contention that there was a constitutional violation here?

MR. MURRAY: No, I'm sorry Judge, I didn't mean for a moment to suggest that. What I'm suggesting here is that in the context of an Article 78 proceeding, to get around the advisory issue that Judge Wesley is so concerned about, the cases are clear that if it's not a hypothetical situation—this case has context and texture. We know that the Governor has done it twice, he's threatened to do it a third time—that's at page 1746 of the Record—the affidavit of Mr. Williams has indicated twice already the Governor has unsuccessfully tried

to pursue another amendment and Mr. Williams is telling us that he is negotiating a third one.

FEMALE JUSTICE ONE: Well then, I'm still a bit at sea, Mr. Murray, because as I understand it you would be willing to blink at the existing one, you're just worried about future ones.

MR. MURRAY: Sure, sure.

FEMALE JUSTICE ONE: Is that an accurate statement?

MR. MURRAY: Yes, Judge.

FEMALE JUSTICE ONE: So then why don't we face the issue when there is another one?

MR. MURRAY: Because, Judge, this is the window of opportunity that we spoke about—or that I spoke about in my supplemental letter. Because the indispensability argument, in order to have traction, has to have an adverse affect upon a party not before the court—that's the whole theory—the underlying predicate for indispensability. Right now, we have this unique window of opportunity. That unique window of opportunity is this amendment has expired, so I'm saying, "Okay, we don't want to jeopardize any vested rights of the Tribe because we don't want to run into the indispensability argument should the Court say it has any traction." Right now, all we're saying is, "Don't sign anything in the future." No Tribe—not the Mohawks nor any other Native American Tribe—claim right now that they're adversely affected—

MALE JUSTICE FOUR: You want us to advise the Governor not to do this in the future?

MR. MURRAY: Yes, and Judge—

FEMALE JUSTICE ONE: Is the reason—is—

MR. MURRAY: [Interposing]—advisory. Here the point is we know from the Governor's track record that he's done it twice and he's going to do it again.

MALE JUSTICE FOUR: Well, my recollection is Governor Cuomo did this twice, and I haven't seen a signature by Governor Pitaki on anything yet.

MR. MURRAY: This isn't about Governor Cuomo or Governor Pataki—

MALE JUSTICE FOUR: No, well, you said "this Governor"—I was—the only governor I know right now is Governor Pataki.

MR. MURRAY: Well, Judge, Governor Pataki in fact did try to amend it twice—

FEMALE JUSTICE ONE: [Interposing] Mr. Murray, what's the base—what's the basis that—we—Mr. Murray, what's the basis that we would be advising the Governor that he can't negotiate in the future? That it's a violation of the separation of powers or because the—

MR. MURRAY: Both.

FEMALE JUSTICE ONE: —Compact itself is unconstitutional.

MR. MURRAY: Yes.

FEMALE JUSTICE ONE: So the your posture would be that the legislature can't ratify the '93 Compact nunc pro tunc. You'd have a different response than Mr. Bing had.

MR. MURRAY: Oh, yes, there's no question, Your Honor, as I think you pointed out, legislative gratification is a nullity if it's unconstitutional. Legislatures can only do what the Constitution—

FEMALE JUSTICE ONE: [Interposing] Well wait a minute, I thought the reason you were arguing it was

unconstitutional was that the legislature hadn't authorized it. So if the legislature authorizes it, doesn't that take away your unconstit—your argument.

MR. MURRAY: Judge Reed—Judge Reed, we argued both. We—

FEMALE JUSTICE ONE: But we don't have to agree with you on both, we can agree with you on one and not the other.

MR. MURRAY: As Judge Rosenblatt, I think, was getting there, Judge Kay, he was asking, "Do we have to get to the second one or can we defer that another time?" The answer to that is I'd really like the Court to do both here. Because let us assume, for example—

FEMALE JUSTICE ONE: I understand that you might like it, Mr. Murray, but we don't have to do it.

MR. MURRAY: No, of course not.

FEMALE JUSTICE ONE: And were we to reach only the first question and then I return to Judge Reed's question, then legislative ratification would be appropriate.

MR. MURRAY: Let me suggest why—as I think Judge Wesley asked in the oral argument the first time around. He said, "Do we have to cross two constitutional bridges or just one?" And here's what I'm saying, let us assume—I think this is a realistic scenario in light of what's happened in this case—that you were to decide, "We're sorry Governor Pataki, but the separation of powers says you can't do this so Judge Teresi's injunction exists, and you don't go further, you don't address the second constitutional question—which it's certainly there's a lot of cases that say courts don't have to address other constitutional issues if they don't need to. But, in the context of this case, what if the legislature turns around next week and in response to the Court's decision says, "Okay, Governor Pataki, you're hereby given the legislative

authorization." As they did with Chapter of 383 of the courts of 2001, which doesn't address these particular Compacts—which was Judge Suparick's [phonetic]—

MALE JUSTICE THREE: That would then raise for the first—that would then raise a question of the constitutionality of gambling per se of the Constitution.

MR. MURRAY: Correct. That's absolutely right.

MALE JUSTICE THREE: So let me ask you this question, and, Tom—

MR. MURRAY: And—and—may I just—I don't mean to interrupt you, Judge, I'm sorry, but—

MALE JUSTICE THREE: Please—sure, go right ahead. No problem.

MR. MURRAY: The problem is, Judge—Judge Pataki—or Governor Pataki might well do that then because that's exactly what the legislature after Justice Teresi acted. They said, "Okay, he didn't have legislative authorization. We were going to give it to him in the other ones." So they did it right away and low and behold Judge—or Governor Pataki then entered right into a Compact. So what I'm saying to you is, if this Court stops and just stops at the separation of powers argument and doesn't go the next step, the legislature might well pass a law—particularly given right now their concerns about budget and revenues—they pass it, Governor Pataki then inks a Compact before we get back here, and then you're faced with the problem again—which we're faced with now—of dealing with another issue—

MALE JUSTICE THREE: [Interposing] Right, well I think everybody understands that, there's always a balance dealing with expediency and efficiency on the one hand, and decision making and the proper constitutional deference on the other hand. My question to you is this, can I ask whether I understand your position correctly in that if you had a magic

wand you would close them down, but that your concern that this Court may not have the wish to do that considering that the prejudice may be too severe, so you're willing to take half a loaf and close them down for the future only. Does that summarize your position?

MR. MURRAY: It does, Judge, because not only does it—it stops them from expanding, but it stops any further violation of the Constitution.

MALE JUSTICE THREE: Okay, all right.

MALE JUSTICE FOUR: So given that that's your position, I have to ask you then—

MR. MURRAY: In terms of your response to questions about advisory opinions, what is your position as to the mootness advisory opinion—justiciability—however you want to denominate it—in light of the concession by the State that this is a live controversy? The State has told us that this is a live controversy, so how does your—how is your position affected by the very candid concession by the State of New York?

MR. MURRAY: If—Judge, you know, if it's a live controversy you don't have to worry about my argument.

MALE JUSTICE THREE: That's—that's—I wanted to see what the discussion—there seemed to be a serious debate about something which appears to have been conceded. I just want to clarify that.

MR. MURRAY: It would be extremely presumptuous for me to try to give Mr. Bing's argument for him, and he's an extremely worthy adversary so I don't have to do that—

MALE JUSTICE THREE: But we heard him three times say that—that it's a live controversy.

MR. MURRAY: But were I to state—I wouldn't—I wouldn't be inviting this Court to take on the whole issue

because I strongly feel that if the Court wants to take the whole ball of wax and declare the '93 compact illegal, that's fine with me. I suggest you don't have to do that. To be Solomononic [phonetic] if you will—

MALE JUSTICE THREE: Then what do we do about—

MR. MURRAY: —if you will, cut the proverbial baby in half.

MALE JUSTICE THREE: Then what do we do about the appellate division decision? Vacate it, ignore it?

MR. MURRAY: Modify it if you will, Judge, I—

MALE JUSTICE THREE: And declare that it was constitutional—modify it in what way?

MR. MURRAY: No, to—I would modify it by simply deleting the termination insofar as the '93 Compact is concerned, but leave—

MALE JUSTICE TWO: So we're finding that that was constitutional, isn't that the effect of what you're saying?

MR. MURRAY: Basically what the appellate—the key, Judge Smith, is Judge Teresi discerned the forest from the trees. He made a decision not only as to the Compacts, but within the power that was given to him under the CPLR with respect to a declaratory judgment action, he said, "Look, I don't have to just tailor my relief to precisely what's narrowly in a declaratory judgment complaint, I have the ability and latitude—as a judge does in a declaratory judgment action—to give complete relief." So he said, "And I further enjoin the Governor from taking any further action absent legislative authority." That's the part that I don't understand. That's the war, it's not the battle. This is a war about—in metaphorical context—this is a small battle—the '93 Compact—that's [inaudible]—

MALE JUSTICE THREE: [Interposing] But your companion here wants it all taken down and he's eager to say so I imagine, so is this—I don't see anything wrong with this, it strikes me as lawyer-like. He wants to take them down and you're willing to say half a loaf. So you're giving us an option. Is that what this is all about?

MR. MURRAY: Yeah, I—

MALE JUSTICE THREE: You can tell us candidly, we're lawyers, we understand these things.

MR. MURRAY: Sure, I don't want to take the whole thing down because I don't think you have to do that to the Tribe. I'm not coming here piously saying I'm a great advocate for the Tribe, there are—forget about the legalities, there are equitable arguments here that the Tribe entered into a Compact in 1993 and they spent thirty million dollars—

FEMALE JUSTICE ONE: It sounds like you're saying they're an indispensable party.

MR. MURRAY: No, I'm not, Judge. No, no, I'm not going that far.

FEMALE JUSTICE ONE: Thank you, Mr. Murray.

MR. MURRAY: Thank you, Judge. I—let me—let make that unequivocally clear, but the point, Judge is—Mr. Goldberg—and again, I wouldn't assume to speak for him as well—I don't think this Court has to do that to the Tribe. I think we have done enough if we say, "What's gone is gone, it's too bad, it should never happen, but please, let's draw a line in the sand here and let's not it happen again."

FEMALE JUSTICE ONE: Thank you, Mr. Murray.

MR. MURRAY: Thank you, Your Honors.

FEMALE JUSTICE ONE: Mr. Goldberg.

MR. GOLDBERG: Yes, and very important point, Judge Rosenblatt, everybody's been talking about equity, [unintelligible], there is at 398 a letter to the Governor from his counsel in 1993. It says very clearly that all throughout the St. Regis—it's at 403—and that is why from the outset of negotiations with the St. Regis Mohawks and with the Nation last summer, the State's negotiators told the Indian counterparts that legislative approval would be required before the State could enter into effect—

MALE JUSTICE THREE: [Interposing] You say they knew—you're saying they knew they were on thin ice. I just had a question on it—it's just a point of curiosity—that letter from Liz Moore [phonetic], how did that surface? Was that made public? I would think that when counsel speaks with the Governor, that would have remained within the confines of the Governor's office. How did that letter reach the light of day, do we know? It is not going to affect the outcome of this case, I can assure you that. I was just curious.

MR. GOLDBERG: No, we don't.

FEMALE JUSTICE ONE: Mr. Goldberg, regardless of how that letter now appears in the record, at some point in 1993, you clients became aware that the Governor signed this Compact.

MR. GOLDBERG: Yes.

FEMALE JUSTICE ONE: And they didn't bring an Article 78 at that time claiming it was illegal.

MR. GOLDBERG: They didn't and you might say—

FEMALE JUSTICE ONE: [Interposing] Isn't that, I mean—

MR. GOLDBERG: —it was a laches—it was a laches if this case was treated as a narrow case. This case is bigger than the Indians. This is whether the Constitution confers on the Governor the right of Compact-making.

FEMALE JUSTICE ONE: Right, so why—why didn't they sue immediately when it was signed. Why do we wait six years?

MR. GOLDBERG: I can't answer that.

FEMALE JUSTICE ONE: If in fact it went to the fundamental nature of either separation of powers or whether the Governor could even sign a Compact because the Constitution didn't authorize this type of gaming.

MR. GOLDBERG: Yes. That is a problem, but for a case cited in this Court—decided in this Court on assumption of the risk. All I can answer is that Ms. Moore from the outset of negotiations repeatedly told the Tribe—

MALE JUSTICE FOUR: Well—now wait a second—no, that's not—that's not—just to be fair, sir, Ms. Moore's letter relates a third-party conversation alleging—now I don't recall Ms. Moore advising the St. Regis, but let me ask you this—if you had brought your Article 78 at the time that the Compact was signed in 1993, regardless of what Ms. Moore said—or what anyone said to the St. Regis Reservation—would not the St. Regis Mohawks have clearly been on notice that a court in New York was going to adjudicate the legitimacy of the Compact—wouldn't it?

MR. GOLDBERG: Yes.

MALE JUSTICE FOUR: And therefore, had they proceeded to go ahead and build a casino and operate it, they would have done so at their peril, wouldn't they?

MR. GOLDBERG: Yes.

MALE JUSTICE FOUR: However, what they did do was they operated under the assumption—their own assumption—perhaps wrong—that the Compact was valid. Indeed the Secretary of the Interior had approved it, and they went ahead and they conducted gaming, and now six years after the fact, your clients seek to have a declaration that that's illegal.

MR. GOLDBERG: Yes, but we don't ask that it be torn down.

MALE JUSTICE FOUR: No that's—now here's my question to you—the same as Mr. Murray—do you, sir, seek to have injunctive relief with regard to the closing of the casino?

MR. GOLDBERG: No.

MALE JUSTICE FOUR: Do you seek to prohibit the expenditure of state funds with regard to the interrelationship with state agencies with Akwesasne Casino?

MR. GOLDBERG: Yes, that's in our complaint, and, Judge—

MALE JUSTICE FOUR: Yes or no?

MR. GOLDBERG: Yes.

MALE JUSTICE FOUR: You do?

MR. GOLDBERG: Yes, and Judge Teresi said, "The defendants are enjoined from expending any state funds."

FEMALE JUSTICE ONE: So what is it exactly that you say would follow if you were to prevail?

MR. GOLDBERG: Well the—

FEMALE JUSTICE ONE: At the casino?

MR. GOLDBERG: —1993, as my adversary says, is a live controversy—

MALE JUSTICE FOUR: That's because of the letter that he got that he got from Mr. Murray saying that he was backing off his request for prospective injunction—or that he wasn't seeking—that he was seeking to not close the casinos. What I need to know from you is—and—what I need to know is you do seek injunctive relief out of this case?

MR. GOLDBERG: As Judge Teresi recited and as our complaint recited—

MALE JUSTICE FOUR: As affects state—the expenditure of state funds—

MR. GOLDBERG: Yes.

MALE JUSTICE FOUR: —with regard to the interaction of state agencies and the St. Regis and the operation of the Akwesasne Casino.

MR. GOLDBERG: Yes, and if you look at the complaint—

FEMALE JUSTICE ONE: So you're—just to follow-up with my question, so I'm very clear on the practical implications of the relief you request, you would close the casino?

MR. GOLDBERG: Well, that's not so. The practical affect might be if you can't spend state funds then you'd have a problem with the casino—

MALE JUSTICE FOUR: That's a very bright answer, but the reality is that the direct answer to the chief question—to the Chief's question is that it would effectuate the closing of the casino.

MR. GOLDBERG: That's possible.

MALE JUSTICE THREE: You want an affirmance—does it—an affirmance declared—the appellate division declared the Compact null and void. Do you or do you not want that affirmed?

MR. GOLDBERG: I want that affirmed.

MALE JUSTICE THREE: You want it affirmed, so if we affirm, it means that the Compact is declared null and void. What happens thereafter, Lord knows, but that's what you're looking for. Do we have that clear?

MR. GOLDBERG: That's—

MALE JUSTICE THREE: So not perspective only, but a declaration of null and void means—means in the past as well.

MALE JUSTICE FOUR: On the [unintelligible]?

MALE JUSTICE THREE: Does it not? You want an affirmance.

MR. GOLDBERG: This is what the appellate division said.

MALE JUSTICE FOUR: Right.

MR. GOLDBERG: —declared the 1993 Compact and its amendment void and unforceable. Now perhaps I've not presented this the way I wanted to—

MALE JUSTICE THREE: We'll get there, we'll figure out what—

MR. GOLDBERG: Now the Preamble, Your Honors—that's why I say it's longer—the Preamble to the Constitution says, "We the people in order to secure our freedom do adopt this Constitution."

FEMALE JUSTICE ONE: Are we talking about the Federal Constitution?

MR. GOLDBERG: State, State—the State Constitution. I thought of going to the Preamble because I liked what was in the Federal Constitution. Sure enough there's the same kind of language. The question is whether, if you don't resolve this case, assuming that the 1993 is a live controversy, are you saying that the Governor has compact-making authority, whether it be Indians or any other subject. There is no court in the country that adopts that approach. The Governor, it is clear, does not have—the Constitution does not confer on the Governor the right to act alone to make compacts. At page thirty-two of my brief there is like forty compacts entered

into. It requires legislative consent, the Governor—unless this Court acts in what he says is a live controversy—then there'll be no guide to future conduct, and that's what Your Honors have said is an important consideration when you think about mootness.

MALE JUSTICE FOUR: Well, concessions don't create justiciability. Justiciability goes to the very power of the court and so that conclusion is ours and ours alone. Not anyone else's or the interpretation of what people say—but what I ask you is this—and you're both very able—all of you are very, very able, but we don't—this isn't—you don't put in your nickel and get an opinion from this Court. This Court requires live controversies in the sense that people have real disputes and that there are real things on the line because we require it so that it sharpens the analysis. It is the underpinning of our ability to resolve matters. We resolve disputes, and yet you and your co-counsel have removed the dispute because you wish a declaration that the agreement is illegal, but you seek no enforcement from it. And so what more is it than we are saying, "Well, this is an illegal agreement, but, by the way, everyone in the State of New York, we're not going to allow you to do anything about it." I know of no other case, ever in this Court, where this Court has said, "Well, that's illegal, but no one, none of you, not anyone in this lawsuit, not anyone else in the state, no one can shut Akwesasne down or seek injunctive relief.

FEMALE JUSTICE ONE: That's not how I understand your position, Mr. Goldberg.

MR. GOLDBERG: That's not—it's not—

FEMALE JUSTICE ONE: You—you—in fact I perceive there's a difference between you and Mr. Murray, so—

MR. GOLDBERG: Yes, look what the Court did—Judge Teresi—he prohibited the expenditure of state funds. Now where did he get that? That's in our complaint. And you say,

most respectfully, all we want is a declaration that the 1993 Compact is void with no further action, most respectfully.

MALE JUSTICE FOUR: Well, I asked you if you wanted an injunction directing the closing of Akwesasne, and you said, "No."

MR. GOLDBERG: No.

MALE JUSTICE FOUR: But then you said, "But I do want to prohibit the expenditure of state funds." Which in essence closes Akwesasne.

MR. GOLDBERG: We don't know that—we don't know that, and remember I had mentioned to—

MALE JUSTICE FOUR: A good reason for the Tribe to be here, wouldn't it? To know what the effect of our relief would be.

MR. GOLDBERG: There's a broader issue, I think the main issue is the interpretation—the construction of the Constitution. I think—I may be wrong—but I think the issue is much more substantial in terms of what our Constitution requires. Without making a rule with respect to future conduct—and the 1999 expiration does not make this moot—in the case that you decided, East Meadow in 18 N.Y.2d, Pete Seeger was to perform on June 1st—June 1st came, they wouldn't let him perform because [unintelligible] they thought he had communist tendencies. He didn't perform on June 1st, it didn't get to the courts until December, and the courts—the lower courts—said, "Well, it's moot, June 1st is past." And the Court said, "No, this is a substantial issue, likely to recur and we must deal with it."

MALE JUSTICE FOUR: Well, a performance is a little bit different than a contract. A contract exists—this contract has been in existence since 1993—

MR. GOLDBERG: Did you say—

MALE JUSTICE FOUR: Contract exists every single day and doesn't avoid the ability of the determination of whether it's legitimate or constitutional or not, unlike a performance or prohibiting a performance would—might do. So—

MR. GOLDBERG: But this is much more important. Did you say—forgive me, did you say "contract"? The Pete Seeger case is less important than this one.

MALE JUSTICE FOUR: No, I didn't say that at all, in fact, I would suspect that the Pete Seeger case is extremely important. But what I'm suggesting to you is that to understand mootness, one looks and sees whether it avoids review. I don't view—to be honest with you, I don't view this case as moot other than the '99 case, I view this as whether it's a live case or controversy or justiciable. After that, then I have serious questions about whether you can sit around for six years and say, "Well we don't have to worry about laches because they're not here." As the appellate division said.

MR. GOLDBERG: And—and—

MALE JUSTICE FOUR: You know, because the State of New York happens to be sovereign with regard to lawsuits, too. The State of New York can't be dragged into every court necessarily, and the federal government has decided to make the Indian Tribes sovereign. Whether we like that or not, that's a federal choice.

MR. GOLDBERG: But didn't—then you would ignore what Ms. Moore said occurred by the negotiations.

MALE JUSTICE FOUR: I certainly would not, but I would certainly want all the parties present before I decided to evaluate that.

MR. GOLDBERG: Well, of course that's their choice, but what is the issue in this case? I haven't made it clear, and that is what does our Constitution—what did the people—

FEMALE JUSTICE ONE: Well, let's say we agree with you, let me ask you the question—I don't think anybody's asked you this one yet—we've asked some of the others.

MR. GOLDBERG: Let's say we agree with you, then can the legislature just turn right around and fix it by ratifying the Compact?

MR. GOLDBERG: On the—

FEMALE JUSTICE ONE: We agree with you—let's say we agree with you, we reach the merits, we agree with you that there's been a violation of separation of powers—

MR. GOLDBERG: Let me answer it this way—I believe Article 1, Section 9 creates an impediment in this way—and I mentioned it last time—I have mentioned that I saw the Tuckbill's [phonetic] volumes and [unintelligible] prohibited since 1824—but certainly our Constitution was enacted in 1894.

FEMALE JUSTICE ONE: So what, your answer is no, because commercialized gambling is banned by the Constitution—is that your answer?

MR. GOLDBERG: Yes, except with an amendment in three areas—it's been amended—paramutuals, lotteries, and—what's the third-

MALE VOICE: Bingo.

MR. GOLDBERG: Bingo—and other than that it is a total ban, and that's why the judge of the appellate division said commercialized gambling is the antithesis—said—commercialized Las Vegas type gambling—which class III is, roulette wheel, baccarat, everything we see in Las Vegas—is the antithesis of the highly regulated scheme set out in our constitutional framework. It said—

FEMALE JUSTICE ONE: So then the legislature then can't ratify the '93 Compact.

MR. GOLDBERG: With respect to gambling, I say they can't. With respect any other Compact, they can.

MALE JUSTICE FOUR: Okay, so if and when—

FEMALE JUSTICE ONE: If they passed a budget bill with an appropriation in it, is that illegal also? Is that an inappropriate—improper appropriation?

MR. GOLDBERG: That doesn't constitute ratification. I think the court below is correct. I think the issue is—

MALE JUSTICE FOUR: Well, the question was whether it's improper or not.

MR. GOLDBERG: Yeah, it—it—

FEMALE JUSTICE ONE: Because for the six years that you didn't challenge this Compact, there were state appropriations.

MR. GOLDBERG: Yes, yes.

FEMALE JUSTICE ONE: Isn't it desirable, Mr. Goldberg, for you to have resolution of the separation of powers issue?

MR. GOLDBERG: Obviously. I think we're all looking at this wrong—most respectfully—in too narrow a focus. Certainly it's likely to recur, unless we—this is an important controversy unless the Governor has guidance—which is one of the exceptions to the mootness—unless there be guidance as to future conduct, does the Constitution give him the power to make Compacts with any sovereign—New Jersey, Canada—does he have that?

MALE JUSTICE THREE: Your position is this should be affirmed—I just want to get that straight—your—it should be affirmed.

MR. GOLDBERG: Of course.

MALE JUSTICE THREE: And that would leave open the question of whether gambling is constitutional under—under—under the anti-gambling provision of the New York State Constitution, which may or may not be left open for another day.

MR. GOLDBERG: Yes.

MALE JUSTICE THREE: In the exchange with Judge Smith there was question of whether we should reach that point—whether we should reach that decision even though it is not as heavily briefed as the separation of powers point. So that the options are, in the event we agree with you, either to affirm and leave for another day the question of whether the gambling per se provision of the Constitution is—was breached or that we reach it, in the event we agree with you, and make a determination on that as well. Is that your—

MR. GOLDBERG: Yes, I think you've stated it, as usual, perfectly. But, Judge—may I say this—is it likely to recur, Judge Wesley—two governors, four thrusts at this approach—that they had the authority to act alone, that the Constitution confers that power on them. As I told you, every court in the country says that were there are no—where there is a Constitution with enumerated powers to the governor, the governor doesn't have the right to make Compact—are we to leave open as to whether the Governor has deferred upon him compact making? Take every one of the first [inaudible].

MALE JUSTICE: [Interposing] [Inaudible].

MR. GOLDBERG: Look at them, the footnote—the magnificent footnote—this case comes squarely within those—

MALE JUSTICE TWO: It's—I'm sorry—in the appellate decision, the court said this Compact is against Article 1, Section 9. If we affirm, that means we are agreeing that it's unconstitutional—the compact and the gambling.

MR. GOLDBERG: The appellate division didn't say that.

MALE JUSTICE TWO: Well, "Under the circumstances, we conclude that the commercialized Las Vegas style gambling authorized by the Compact is the antithesis of the highly restricted and rigidly regulated Constitution Article 1, Section 9, forms of gambling permitted by the New York Constitution."

MR. GOLDBERG: Judge Smith, if that's taken as a holding, yes, and affirmance on that ground would be appropriate. We argue that at the very least it required approval of the legislature, or, on the other hand, the Governor is not free to act for the state as though he were the state. And there's a footnote in Seminole [phonetic] by Chief Justice Renquist in which he says it is not conceivable that an individual could consider himself the state, and there must be something more. And, as I've said to you before, every state that's considered this is in accord. I'm going to leave you with this, I know my—

MALE JUSTICE THREE: You keep on talking about separation of powers, and Judge Smith's question is whether an affirmance would take within it's scope a declaration of unconstitutionality under Article 1—that's what he—so—

MR. GOLDBERG: Yes, it would vindicate—vindicate the will of the people that there is a difference between Article 3 and Article 4, that no one may usurp—you know, the statements of constitutionality are so eloquent—eloquently made by this Court that I'm not going to improve upon them.

FEMALE JUSTICE ONE: You were going to leave us with something Mr. Goldberg.

MR. GOLDBERG: I have to—you know, I came from California for this so I'm trying to get my money's worth, and now I have to go back.

MALE JUSTICE FOUR: Mr. Goldberg, I know you're going, but let me ask you one last question—293 App. Div. 2d, quote, "It is important to note plaintiffs did not seek to shut down the Tribe's casino located on Akwesasne Reservation. Insofar as that it is operated in accordance with the original Compact." Of course, we know that in the original Compact there are—it provides for the expenditure of state monies. Do you repudiate that statement?

MR. GOLDBERG: Yes.

MALE JUSTICE FOUR: Okay.

MR. GOLDBERG: May I just say this to you?

MALE JUSTICE FOUR: So the appellate division is either in error or it was never right.

MR. GOLDBERG: Or—or—and look at the—

MALE JUSTICE FOUR: Fair enough.

MR. GOLDBERG: Judge Wesley, if you'll look at the affirmance, the affirmances of Judge Teresi—you have to see what Judge Teresi said—

MALE JUSTICE FOUR: I have to read what the appellate division wrote as the premise for its relief so—

MR. GOLDBERG: And you have to look at our complaint.

MALE JUSTICE FOUR: You say that misstates your position at the appellate division?

MR. GOLDBERG: Yes and—no, it states our position before Judge Teresi; the appellate division affirmed what Judge Teresi did.

MALE JUSTICE FOUR: Fair enough.

MR. GOLDBERG: I mean it is an unhappy situation; it could have been done earlier. But whether it could have been

done earlier or not, we're dealing with—I'm sorry to say—the vindication—the protection of a Constitution, and that to me, sir, is quite a difference than a laches coming up in the course of a commercial contract. If this isn't a substantial matter involving the construction of a Constitution, then I don't know what is. There will be no limit to what can be done by a Governor who thinks he can engage in compact-making on his own without the legislature—just on his own.

FEMALE JUSTICE ONE: Thank you.

MR. GOLDBERG: As Governor Cuomo—

FEMALE JUSTICE ONE: Thank you, Mr. Goldberg. Mr Bing?

MR. GOLDBERG: Thank you, Your Honor. Oh, by the way, I've prepared a chronology—would anybody like that? I served it on everybody, it just has dates and—

FEMALE VOICE ONE: Does your adversary have any objection?

MR. BING: Your Honor, we had an opportunity to make written submissions last week, everything in the chronology is in our briefs, I believe.

MR. GOLDBERG: I thought it would make it easier for you.

MALE VOICE: Fair enough.

MR. GOLDBERG: Don't want it? Okay.

MR. BING: Your Honor—thank you, Your Honor. I think that everything that particularly counsel for the Wright plaintiffs, Mr. Goldberg, just said, I think emphasized the prejudice that is inherent in this case to the Tribe, and I think establishes the Tribe's indispensability and the reason why, at this stage, this action should have been dismissed on indispensability.

MALE JUSTICE FOUR: As to Mr. Murray's concessions, is there a live controversy—in your view?

MR. BING: My concessions regarding the live controversy focus primarily on what Mr. Goldberg said in his response.

MALE JUSTICE FOUR: All right.

MR. BING: I'm troubled by Mr. Murray's argument that there's something to prospective injunctive relief here. I think that the prospective injunctive relief, to the extent that it—all the Court would be saying is that defendant's must obtain legislative authorization for future compacts—I think would be a futile gesture because we've now been advised that the compact is void for want of an authorization the legislature was powerless to give. So I think that any such an order would be completely futile on the part of the Court, and again, I would point out the necessity of such prospective injunctive relief is probably—and it's been called into question by the fact that Chapter 383 shows that future compacts may well have the imprimatur of the legislature. So as far as this action is about lack of legislative authorization, I submit that the question of recurrence just may not be here.

FEMALE JUSTICE ONE: No, but insofar as the validity of the 1993 Compact as challenged, there certainly is a live controversy, isn't there?

MR. BING: Certainly Mr. Goldberg seeks to void the 1993 Compact and terminate the expenditure of funds to the casino pursuant to it, which I do think would likely have the effect of closing the casino. Certainly, it would have the effect of depriving the Tribe of the benefit the bargain had struck. I think it's important to emphasize again the issue of statute of limitations and laches. As Judge Wesley pointed out, the courts—the [inaudible] reasoning on—

MALE JUSTICE FOUR: It will predetermine the decision with regard to turning-stone [phonetic] also, will it not?

MR. BING: I would prefer not to take any position with respect to turning-stone. I will say that turning-stone was signed—that the Oneida Compact was signed in 1993—

MALE JUSTICE FOUR: By the Governor alone.

MR. BING: —by the Governor alone. I believe their keno was open earlier and we—

MALE JUSTICE FOUR: And they were sued six years almost—within—almost—close to six years the day of the original opening of the casino, were they not?

MR. BING: Are you talking about the Oneida casino?

MALE JUSTICE FOUR: The Oneida case was commenced just shortly before the six-year statute expired.

MR. BING: I think—Your Honor, I don't remember exactly when the—

MALE JUSTICE FOUR: Well, it's contained in the affidavit of the application in the Oneida Nation's amicus standing in this, so it's a matter of record before this Court and it's unrefuted.

MR. BING: It's in their brief, I think yeah. I mean, you've heard from the Oneidas. I think that it's important to emphasize that delay here would be extremely prejudicial, and that together with our mootness argument with respect to the 1999 Amendment—and again, I think for the reasons I indicated earlier—the exception doesn't apply to the 1999 Amendment. I think that is a way of addressing this case, certainly not the only way. We set forth in addition to indispensable party, also standing arguments and our merits arguments which in our brief went to the question of separation of powers, but also to the legitimacy of the IGRA process, which is what's been challenged by the argument

that the gaming is illegal. The fact is, as I said earlier on, under the supremacy clause with effect to commerce for the Indian Tribes Congress has plenary authority, and they've exercised it here. And to the extent that IGRA looks to state law, state law allows massive amounts of legalized gambling, and the Compact that was negotiated—the 1993 Compact—has followed the IGRA blue-print in authorizing only gaming that was already lawful in New York State for some person for some purposes, or could have been authorized by the Racing and Wagering Board without further—

MALE JUSTICE THREE: Mr. Bing, if we disagree with you on the separation of powers argument, what is your position as to whether we should reach the second constitutional question?

MR. BING: Judge Rosenblatt, I think that what the Third Department said in its opinion regarding the nature of this gaming is probably—[inaudible] in the sense that the holding they affirmed did not reach that issue.

MALE JUSTICE THREE: It's hard to really put your finger on what—on the solid nature of that—or what was intended.

MR. BING: I would respectfully suggest that this case is really about legislative authorization. Subsequent cases where the issue perhaps more squarely is presented may be the forum for which that question gets resolved. Obviously, if the Court feels it must address it, then I believe that the Court should find that the gaming is legal.

MALE JUSTICE THREE: Is legal.

MR. BING: For the reasons set forth in our brief.

MALE JUSTICE THREE: Are we able to make a determination like that based on a record in which there are all kinds of games that—there's a whole assortment of games and it's hard to tell which fall into the authorization and

which do not. Are we able to make a determination like that here, do you think?

MR. BING: I think the record shows, Your Honor, and I think we said this in our brief, that the games that were authorized pursuant to the Compact, were those that were either already allowed under the Racing and Wagering Board regulations for charitable purposes or those that the Racing and Wagering Board could have allowed without further legislative action and thus were within the executive sphere of influence.

MALE JUSTICE THREE: So it's basically your view that we let that—that we leave that question alone.

MR. BING: I think—again, respectfully, I think this case—if the Court should focus on the authorization issue I think there are other cases that may present more squarely the question of the legality of the gaming. I think, as I said earlier, that if the Court finds that it must address the issue, then I would certainly urge the Court to find that the gaming is legal.

FEMALE JUSTICE ONE: Thank you, Mr. Bing.

MR. BING: Thank you very much, Your Honors.

BAILIFF: All please rise. Hear ye! Hear ye! Hear ye! All persons having any further business before this Court of Appeals of and for the State of New York may depart hence and appear here tomorrow afternoon at two o'clock at which time this Court now stands adjourned.

FEMALE JUSTICE ONE: Good afternoon.

[END OF HEARING]

APPENDIX B

[LOGO]

Upstate Citizens for Equality
Niagara Frontier Chapter
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West Seneca, NY 14224-1235
http://www.nfc-uce.net

June 20, 2003

Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L Street, NW
Suite 9100
Washington, DC 20005

Dear Chairman Hogen:

I am writing to you today on behalf of the members of Upstate Citizens for Equality regarding the recent ruling of the New York Court of Appeals in the matter of Saratoga County Chamber of Commerce v. Pataki and its effects on Class III gaming in the Mohawk and Oneida casinos. In this decision the Court declared invalid the 1993 compact entered into between the Mohawks and former Governor Cuomo. Therefore any Class III gaming occurring at the Mohawk casino is in violation of the IGRA.

Since this decision declared that the governor of our state cannot enter into any gaming compact without legislative approval, and that all lower courts are now bound to this principle by the doctrine of stare decisis, any casino conducting Class III gaming in the absence of such legislative approval is also in violation of the IGRA.

Therefore we are requesting that you take immediate action to order the Mohawk and Oneidas to cease and desist from conducting any Class III gaming until such time that they obtain legislative approval.

Sincerely,

/s/ Daniel T. Warren
DANIEL T. WARREN
Chairman
Niagara Frontier Chapter of Upstate Citizens for Equality

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